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No. 85-1696

In the Supreme Court of the United States

OCTOBER TERM, 1986

DOUGLAS B. WHITNEY, M.D., ET AL., PETITIONERS

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners are physicians who have chosen to treat Medicare patients, but have declined to participate in a Medicare program that provides physicians with direct payment of a patient's Medicare insurance benefits. Petitioners contend that Section 2306(c) of the Deficit Reduction Act of 1984 (DRA), 42 U.S.C. (Supp. II) 1395u(h)-1395u(j), which temporarily freezes the fees that "non-participating" physicians may charge Medicare beneficiaries, violates the Due Process Clause. They also contend that Section 2306(c), which provides incentives for physicians to participate in the direct payment program and creates administrative sanctions for non-participating physicians who unlawfully raise the fees they charge Medicare patients, constitutes an unconstitutional bill of attainder.

1. Congress enacted the Medicare program as Subchapter XVIII of the Social Security Act, 42 U.S.C. (& Supp. II) 1395 *et seq.* Under Part B of that Subchapter, eligible persons may participate in a program providing supplemental medical insurance benefits for certain services, including physician services. See 42 U.S.C. (& Supp. II) 1395j-1395w. Prior to the enactment of the DRA, a person covered by Part B of Medicare could either pay the physician the full amount of the charge for treatment and then obtain federal reimbursement for 80% of the "reasonable" charge for that treatment, or he could, if the physician agreed, assign to the physician his right to reimbursement (42 U.S.C. 1395*l*, 1395u(b)(3)(B)). In the latter instance, the physician would collect from the patient no more than the remaining 20% of the "reasonable" charge (42 U.S.C. 1395*l*). Congress defined a "reasonable" charge as the lowest of (1) the physician's "actual charge," (2) his "customary" charge, or (3) the charge "prevailing" among most local physicians for the particular services. See 42 U.S.C. 1395u(b)(3). Medicare's "customary" and "prevailing" charge data were updated on July 1 of each year.

The DRA made several changes in physician reimbursement. First, Section 2306(a) froze both the "prevailing" and "customary" charge levels for a 15-month period beginning July 1, 1984, at levels no higher than those for the 12-month period beginning July 1, 1983 (42 U.S.C. (Supp. II) 1395u(b)(4)). In addition, Section 2306(c) requires that physicians decide before October 1 of each year whether they will be "participating" or "non-participating" physicians for that year (42 U.S.C. (Supp. II) 1395u(h)). A participating physician agrees to accept payment on an assignment basis for all his Medicare patients and his total fee for a Medicare patient is effectively limited to the "reasonable" charge. A physician who chooses "non-participating" status receives payment from the patient but may continue to accept assignment on a case-by-case basis.

Section 2306(c) of the DRA also provides, as a temporary measure, that a non-participating physician may not bill a Medicare patient for actual charges in excess of the physician's actual charges for that service in the calendar quarter beginning April 1, 1984 (42 U.S.C. (Supp. II) 1395u(j)).[1] This subsection also requires the Secretary to monitor compliance. The Secretary may bar a physician who knowingly and willfully violates the fee limitation from future participation in the Medicare program for up to five years and may impose a civil penalty of up to $2,000 for each violation (42 U.S.C. (Supp. II) 1395u(j)(1), (2)).

Finally, Section 2306(c) of the DRA provides several incentives for physicians to "participate" in the direct payment program. It instructs the Secretary to: (1) publish a directory of participating physicians and make that directory available to Medicare enrollees; (2) maintain a toll-free telephone number for enrollees to obtain the names and specialties of participating physicians; (3) publish a list of the percentage of patients accepted by each physician on an assignment basis; and (4) provide for electronic receipt of claims from participating physicians so that their claims can be processed more rapidly. 42 U.S.C. (Supp. II) 1395u(h), (i). In addition, Section 2306(a) of the DRA provides that in determining the "customary" charges of non-participating physicians for the 12-month periods beginning October 1, 1985 and October 1, 1986, the Secretary shall not "recognize increases in actual charges for services furnished" during the freeze period (42 U.S.C. (Supp. II) 1395u(b)(4)(D)). Any increases in participating physicians' actual charges,

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[1]Section 2306(c) places no restriction on the fees a non-participating physician may charge non-Medicare patients.

however, will be recognized in computing their "customary" charge profiles once the freeze is lifted.[2]

2. Petitioners are non-participating physicians who treat Medicare patients and are thus subject to the DRA's fee freeze. They filed suit in the United States District Court for the Northern District of Georgia, challenging the constitutionality of Section 2306. They contended that the fee freeze violates the Due Process Clause and that the provisions providing incentives for participation in the direct payment plan and sanctioning freeze violations constitute a bill of attainder. The district court rejected these arguments (Pet. App. 29a-45a) and the court of appeals affirmed (*id.* at 1a-27a).

The court of appeals first held that Section 2306(c) withstands due process scrutiny. It stated that the fee freeze is a rational and legitimate method for Congress to reduce the government's expenditures on Medicare while preventing non-participating physicians from shifting the resulting burdens to elderly Medicare beneficiaries (Pet. App. 14a-17a). The court also observed that the fee freeze is a temporary measure, enacted to protect Medicare beneficiaries from hardships pending the preparation of a more comprehensive program (*id.* at 17a-18a). The court rejected petitioner's argument that Section 2306 constitutes a bill of attainder, concluding that its provisions do not result in legislative punishment, that Congress did not intend to punish non-participating doctors, and that there are legitimate non-punitive purposes for the legislation (Pet. App. 22a-26a).

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[2]Subsequent legislation extended the physician fee freeze through March 14, 1986 (Pet. App. 7a n.3). The Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 9301, 100 Stat. 184, continued the freeze for non-participating physicians through December 31, 1986. That Act authorized an increase in the "customary" and "prevailing" rates, effective April 30, 1986, for participating physicians. Congress at the same time gave non-participating physicians a renewed opportunity to become participating physicians. *Ibid.*

3. The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals.[3] There are no special or important reasons justifying this Court's review.

a. Petitioners' due process challenge to the constitutionality of Section 2306 is plainly infirm. Petitioners' treatment of Medicare patients is entirely voluntary. Congress does not require physicians to treat Medicare patients and Congress has not limited the fees that physicians may charge non-Medicare patients. If petitioners are dissatisfied with the Medicare program's reimbursement conditions, and, in particular, with provisions designed to protect elderly Medicare patients from increased health care costs, they are free to limit their practice to non-Medicare patients.[4]

Even apart from the voluntary nature of their Medicare activities, petitioners have failed to demonstrate a violation of due process. Social or economic legislation satisfies substantive due process requirements provided that it is not " 'arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt.' " *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 769-770 (1968) (quoting *Nebbia* v. *New York*, 291 U.S. 502, 539 (1934)). Petitioners' claims fall far short of that standard. As the court of appeals observed (Pet. App. 16a), Section 2306's freeze on the fees charged by non-participating physicians represents

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[3]The courts have heard challenges to the constitutionality of Section 2306 on two other occasions and have upheld its validity in both instances. See *Private Medical Care Found., Inc.* v. *Bowen*, No. CIV-84-2275-W (W.D. Okla. May 30, 1986); *American Medical Ass'n* v. *Heckler*, 606 F.Supp. 1422 (S.D. Ind. 1985).

[4]Cf. *Bowles* v. *Willingham*, 321 U.S. 503, 517-518 (1944); *Minnesota Ass'n of Health Care Facilities, Inc.* v. *Minnesota Dep't of Public Welfare*, 742 F.2d 442, 446 (8th Cir. 1984), cert. denied, 469 U.S. 1215 (1985).

a reasonable method of fulfilling a legitimate legislative goal. The freeze was carefully formulated to reduce the Medicare expenditures without burdening Medicare beneficiaries.

Unlike participating physicians, who limit their fees to Medicare-determined "reasonable" charges, non-participating physicians—absent the fee freeze—could charge Medicare recipients any amount they wished. The Medicare patient would be forced to pay the full amount, subject to reimbursement from Medicare for 80% of the fee that Medicare determines is reasonable. Medicare patients, typically elderly persons on a fixed income, are ill-equipped to respond to rapid increases in health care costs. The fee freeze shields them from increased out-of-pocket costs resulting from increased charges by non-participating physicians.

Non-participating physicians continue to receive a reasonable fee based on the physician's charges for similar services in the quarter immediately preceding the freeze.[5] In addition, the freeze is a temporary measure that maintains the status quo while Congress conducts a more comprehensive examination of the Medicare program.[6] Furthermore,

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[5]Petitioners argue (Pet. 24) that the freeze is arbitrary because it penalizes physicians who in the past have kept their fees low, but now would like to raise them. But there is no reason to believe that the physicians' past rates were not set at fully remunerative levels. And there is nothing in the record of this case to support petitioners' claim that they have "scrupulously kept their fees low" (*ibid.*). As the court of appeals noted (Pet. App. 17a), Congress intended the freeze to work in concert with the efforts of the American Medical Association and individual medical societies that have urged their members to freeze their fees voluntarily.

[6]As the court of appeals stated (Pet. App. 18a), "Congress could reasonably determine that a temporary fee freeze, pending the preparation of a more comprehensive program, was necessary in order to prevent Medicare beneficiaries from bearing the burden of the reduction in Medicare expenditures."

physicians who object to the freeze retain the option of becoming participating physicians and limiting their charges to the Medicare-determined reasonable fee.[7] Under these circumstances, there is no serious doubt that Section 2306 satisfies due process requirements.

b. Petitioners' contention that Section 2306 constitutes a bill of attainder is frivolous. As the court of appeals held (Pet. App. 22a-26a), the provision does not inflict legislative punishment at all. Rather, it furthers the non-punitive legislative purposes of encouraging physicians to become participating physicians in the direct payment program and of prohibiting physicians from shifting increased costs to Medicare beneficiaries. Congress has the undoubted power to require that Medicare patients seek treatment from physicians who will comply with the Medicare reimbursement scheme. Similarly, Congress can take reasonable steps to encourage physicians to participate in the direct payment program and to encourage Medicare patients to seek treatment by participating physicians. And plainly, statutory provisions that merely establish administrative penalties for noncompliance with regulatory requirements do not constitute a bill of attainder.[8]

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[7]Petitioners argue (Pet. 23-24) that if Congress is going to regulate physicians' fees, it must create a regulatory board, commission, or body to set standards in such a way that all physicians can earn sufficient income. But there is no such constitutional requirement. *Bowles* v. *Willingham*, 321 U.S. at 516-517, 519. Cf. *Andrus* v. *Allard*, 444 U.S. 51, 68 n.25 (1979); *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 124 (1978); *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 445 (1915).

[8]Notably, Congress has provided that money collected as civil penalties may be used to pay restitution to beneficiaries who were overcharged (42 U.S.C. (Supp. II) 1395u(j)(4)).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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